IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.651 OF 2005

Raman Ganda ..Petitioner.

Vs.

Executive Engineer,

Public Works Dept. & Ors. ..Respondents.

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Mr.S.P.Inamdar for the Petitioner.

Mr.Ashokan for the Respondents.

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CORAM : A.P.SHAH,

DR.D.Y.CHANDRACHUD, JJ.

15th July, 2005.

ORAL JUDGMENT : (Per DR.D.Y.CHANDRACHUD, J.)

1. Rule, by consent made returnable forthwith. Counsel appearing on behalf of the Respondents waives service. By consent taken up for hearing and final disposal.

2. The Petitioner was appointed as a daily wager in the Water Supply Department of the Union Territory of Daman and Diu in 1969. He worked in that capacity for eighteen years, until 28th September, 1987. The authorities conferred upon the Petitioner the status of a temporary employee on 29th September, 1987. He worked as such for another fifteen years until 28th February, 2002 on which date he attained the age of superannuation. The case of the Petitioner is that he was entitled to regularization and to pension upon superannuation. The Petitioner was, however, paid an amount of Rs.65,498/- under the Contributory Provident Fund Scheme (CPF). According to the Petitioner, half of the 18 years of service from 1969 and 1987 was liable to be counted as qualifying service towards pensionary benefits and that the 15 years of service rendered by him between 1987 and 2002 must similarly be counted towards pensionary benefits. The Petitioner relied upon an Office Memorandum dated 1st May, 1987 of the Government of India in support of his contention. In view of the recommendations of the 4th Central Pay Commission it was decided that all CPF beneficiaries in service as on 1st January,

1986 should be deemed to have come over to the pension scheme unless they had specifically opted to continue under the CPF scheme. In the present case, it was asserted that the Petitioner must be deemed to have come over to the pension scheme; that no specific option in that regard was taken and that the denial of pensionary benefits is not in accordance with law. The Petitioner relied upon a decision of the Central Administrative Tribunal in a similar case, in which a co-worker by the name of Babu Ramji Dhanu had succeeded in his claim for pension, in a judgment dated 2nd December, 1998 of the Central Administrative Tribunal in O.A. 1173 of 1997. That judgment attained finality since the Petition filed by the Respondents herein before this Court was dismissed for default.

3. The Petitioner moved the Central Administrative Tribunal in O.A. 529 of 2003 which came to be dismissed by an order dated 24th June, 2004. The Tribunal relied upon Rule 2(d) of the Pension Rules which provides that the rules shall not apply to persons entitled to the benefit of Contributory Provident Fund. The Tribunal was of the view that once the Petitioner had been paid

benefits under the CPF scheme amounting to Rs.64,498/- inclusive of an amount of Rs.27,895/- towards government contribution, it was not open to the Petitioner to seek the benefit of pension. The case of Babu Ramji Dhanu was held to be distinguishable. The Petitioner thereupon moved the Tribunal again in an application for review seeking to place reliance on the Office Memorandum of the Union Government dated 1st May, 1987. The review application has been dismissed.

4. In considering the submissions that have been urged on behalf of the Petitioner it would at the outset be necessary to advert to the decision of the Central Administrative Tribunal in Babu Ramji Dhanu v. The Executive Engineer, Public Works Department - O.A. 1173 of 1997 which was decided on 2nd December, 1998. Babu Ramji Dhanu who was admittedly a co-worker together with the Petitioner had also been appointed as a daily wager in the Water Supply Department of the Public Works Department in the Union Territory of Daman and Diu in 1969. Like the Petitioner, Dhanu worked as a daily wager for 18 years until he was appointed on a temporary work charge basis on 29th September,

1987. The Petitioner, it may be noted, was also conferred temporary status as a Beldar on 29th September, 1987. Dhanu retired on 21st August, 1996 and was not paid pension after having put in 28 years' of service. The defence of the Department in Dhanu's case was that since the service which was rendered from 1st October, 1987 until the date of superannuation fell short of 10 years, he would not be entitled to pensionary benefits. Before the Tribunal, reliance was placed by the Department on Rule 2 of the Central Civil Services (Pension) Rules, 1972 under which casual and daily rated employees are disentitled to pensionary benefits. The Tribunal in that case adverted to the provisions of Rule 14 which provides for qualifying service and to two circulars dated 14th May, 1968 and 10th March, 1986 under which the Government of India decided that 50% of the service of daily rated or monthly rated labourers should be allowed to count towards pension at the time of absorption in regular employment. The Tribunal noted that Dhanu was taken as a temporary labourer from 1st October, 1987 and under Rule 10 of the Central Civil Services (Temporary Service) Rules, 1965, even a

temporary employee was entitled to pensionary benefits provided he had the required qualifying service. Reliance was thereafter placed on the relevant provisions of the CPWD manual. The Tribunal came to the conclusion that Dhanu had worked as a daily wage labourer for 18 years and as a temporary labourer for nine years. The Tribunal held tht it was appropriate that he should be regularized atleast with effect from 1st October, 1987 upon the conferment of temporary status. The employee concerned was held to possess the requisite qualifying service for pension since half the service which had been rendered as a daily wager was liable to be counted for pensionary benefits under the aforementioned circular of the Union Government. The Tribunal, however, declined to grant to Dhanu arrears of salary with effect from 1st October, 1987 holding that his salary should be notionally fixed with effect from 1st October, 1987 and that his pensionary benefits should accordingly be computed in accordance with law by counting half the service as a daily wager and the service rendered between 1st October, 1987 and the date of superannuation in computing pensionary benefits.

5. The judgment of the Tribunal in Babu Ramji Dhanu's case has attained finality. A petition under Article 226 that was filed by the Department before this Court to challenge the aforesaid decision came to be dismissed by a Division Bench in default as far back as on 5th June, 2002. Nothing has been brought to our notice to establish either that the Petition has been restored or that any steps have been taken in that regard by the Department.

6. Apart from the judgment of the Tribunal in Babu Ramji Dhanu's case, the Petitioner can legitimately draw sustainance from the Office Memorandum dated 1st May, 1987 of the Government of India (Exh.B to the Petition). This O.M. records that Central Government employees who are governed by the CPF scheme had been given options in the past to come over to the pension scheme, the last of which was dated 6th June, 1985. The Fourth Central Pay Commission recommended that all CPF beneficiaries in service as on 1st January, 1986 should be deemed to have come over to the pension scheme on that date unless they have specifically

opted out to continue under the CPF scheme. Clauses 3.1 and 3.2 of the O.M. provides as follows :

> "3.1. All CPF beneficiaries, who were in service on 1st January, 1986, and who are still in service on the date of issue of these orders (viz., 1st May, 1987) will be deemed to have come over to the Pension Scheme.
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> 3.2 The employees of the category mentioned above will, however, have an option to continue under the CPF Scheme, if they so desire. The option will have to be exercised and conveyed to the concerned Head of Office by 30-9-1987, in the form enclosed if the employees wish to continue under the CPF Scheme. If no option is received by the Head of Office by the above date the employees will be deemed to have come over to the Pension Scheme."

7. In the present case, there is no reason why the Petitioner should not upon parity of reasoning

be given the benefit of the pension scheme. Under the O.M. dated 1st May, 1987, an employee is not required specifically to opt for the pension scheme. On the contrary, an employee is deemed to have come over to the pension scheme unless he specifically opts for benefits under the CPF scheme. If no option was received by 30th September, 1987, the employee will be deemed to have come over to the pension scheme.

8. Learned counsel appearing on behalf of the Respondents relied upon a judgment of the Supreme Court in Committee for Protection of Rights of ONGC Employees v. Oil and Natural Gas Commission through its Chairman ((1990) 2 SCC 472). That was a case where upon the establishment of ONGC, as a independent statutory body, the Provident Fund Act and scheme were made applicable to it. The Petitioners before the Supreme Court represented persons who were initially employed on a temporary basis and were absorbed after the enactment of the ONGC Act. The case of the petitioners before the Supreme Court was that these employees were entitled to pension on their being made permanent irrespective of the fact that they were entitled to

Provident Fund benefits under the Provident Fund Act and scheme. The Supreme Court rejected the submission holding that the Petitioners were employed on a temporary basis when the Commission was established as a statutory body and at that time they were not entitled to claim pension since under the rules pension was not payable to a temporary employee. The Supreme Court held that such employees could not claim that on the date of their becoming employees of the Commission they had a right to pension which was protected under the statutory regulations. The case is, therefore, clearly distinguishable. The employees there being temporary employees were not entitled to pension. They were found to have availed of the benefit of the Provident Fund Scheme for 28 years and consequently, the Supreme Court held that it was not open to them to claim the benefit of pension.

9. For all these reasons we are of the view that the rejection of the claim of the Petitioner for pensionary benefits was not valid and justified. At the same time, it is necessary that the Petitioner must refund the benefits that he has received under the CPF scheme together with

interest before he can be allowed the benefit of the pension scheme. The O.M. dated 1st May, 1987 provides for the payment of interest at 10% per annum when a refund of Government's contribution to the CPF is required to be made. In these circumstances, we allow this Petition by setting aside impugned orders of the Tribunal dated 24th June, 2004 and 18th August, 2004. In terms of the directions which were issued by the Central Administrative Tribunal in O.A. 1173 of 1997, this Petition shall stand disposed of in the following terms :

i) The Respondents are directed to regularize and absorb the Petitioner as a regular employee with effect from 1st October, 1987. On this basis, the pay of the Petitioner shall be notionally fixed on 1st October, 1987 and thereafter from time to time until his superannuation on 28th February, 2002. The Petitioner shall not be entitled to any arrears of salary for this period;

ii) Upon the notional fixation of the last drawn pay of the Petitioner as on 28th February,

2002, the qualifying service for the purposes of pension shall be reckoned from 1st October, 1987 till 28th February, 2002 to which half the service rendered by the Petitioner as a daily wage labourer from 1969 until 30th September, 1987 shall be added. The Petitioner shall be entitled to retiral benefits in accordance with rules on 28th February, 2002 including pensionary benefits;

iii) The grant of pensionary benefits shall be subject to the precondition that the Petitioner must first refund to the Respondents the Government's contribution to the CPF scheme together with interest at the rate of 10% per annum. The first, second and third Respondents shall intimate the amount which is due and liable to be refunded by the Petitioner as aforesaid within a period of four weeks from today after which the Petitioner shall have a further period of 8 weeks to refund the amount as directed;

iv) The pensionary dues including arrears of pension shall thereupon be paid over to the

Petitioner within two months thereafter.

10. The Petition shall stand disposed of in the aforesaid terms. There shall be no order as to costs.